Kuala Lumpur Finance Bhd v Yap Poh Khian (Teo Sik Eng & Anor, Interveners)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO F16 OF 1985
LIM BENG CHOON J
4 JULY 1991

Contract *— Time of the essence — Sale of land by public auction — Whether grants of extension of time for payment of balance of purchase price caused time to be no longer of the essence of the contract — Whether sellers entitled to terminate contract and forfeit deposit — National Land Code 1965 s 256*

Land Law *— Order for sale — Chargor's land sold to purchasers (interveners) by public auction — Application by chargor for order to terminate contract of sale and for forfeiture of deposit — Failure of purchasers to pay balance of purchase price within fixed period — Whether chargor had locus standi to set aside sale — Whether registrar had jurisdiction to grant extension of time without chargee's consent — National Land Code 1965 s 256*

The plaintiffs were the chargees of the defendant's property ('the property'). Upon the defendant's default in repayment of the loan, the plaintiff obtained a court order for the sale of the property by public auction. The proclamation of sale specifically stated that there were four private caveats entered against the property and that the property would be sold subject to conditions stated therein. The conditions of sale provided, inter alia, that 10% of the purchase price was to be paid as a deposit at the fall of the auctioneer's hammer with the balance to be paid within 90 days from the date of sale. Time to pay the balance of the purchase price was made the essence of the contract and in the event of failure to do so, the deposit would be forfeited.

The purchasers of the property ('the interveners') could not pay the balance of the purchase price within the stipulated time and they applied to the senior assistant registrar for an extension of time. Subsequently, the senior assistant registrar granted two more extensions of time which were not objected to by the plaintiffs. However, the interveners still failed to pay within the extended time. The plaintiffs and the defendant objected to a further extension of time and wrote to the senior assistant registrar to forfeit the deposit. The senior assistant registrar, however, wrote a letter to the first intervener requiring him to pay the balance of the purchase price within two weeks from the date of the letter. The interveners paid the balance of the purchase price to the senior assistant registrar with the condition that the money should not be released to the plaintiffs until the private caveats had been removed and the property could be transferred to the interveners. The defendant applied to the High Court, inter alia, for an order to cancel the senior assistant registrar's letter and to forfeit the deposit. The interveners applied to oppose the defendant's application. The interveners firstly argued that the defendant had no

A locus standi to make the application. It was then argued that although time was originally the essence of the contract, the plaintiffs by allowing the time fixed for payment to pass, had caused time to be no longer the essence of the contract. The interveners finally contended that they were not bound to pay the balance of the purchase price until the private caveats had been removed. The issue also arose as to whether the senior assistant registrar had jurisdiction to allow the time for payment to be extended for a further two weeks.

Held, allowing the defendant's application:

(1) In a forced sale under s 256 of the National Land Code 1965, the chargee is the vendor because the chargor abdicates his rights as the registered owner of the property in favour of the chargee. However, the chargor may intervene to set aside the sale if the sale has been conducted fraudulently, collusively or improperly to the prejudice of the chargor. The effect of setting aside the sale is to restore the chargor's right of discharge of the charge. Accordingly the defendant had the locus standi to make this application.

(2) The plaintiffs had merely agreed to extend time for the payment of the balance of the purchase price to new fixed dates. There was no evidence to show that the plaintiffs were prepared to waive the condition that time was to be of the essence of the contract. Since the interveners had failed to pay by the final date fixed for payment, the plaintiffs were entitled to request the senior assistant registrar to forfeit the deposit.

(3) The conditions of sale did not subject the payment of the balance of the purchase price to the removal of the private caveats. The interveners knew about the caveats before bidding and they took the risk of purchasing the property.

(4) A forced sale of land subject to a charge under s 256 of the National Land Code 1965 is conducted by a registrar or licensed auctioneer as agent of the chargee who is the real vendor. Neither the registrar nor the auctioneer has any interest in the sale. The senior assistant registrar had no right to grant an extension of time for payment without the plaintiffs' consent. In this case, the senior assistant registrar's extension of time for payment was made long after the final fixed date for payment and after the plaintiffs had requested the deposit to be forfeited. The senior assistant registrar's letter extending time for payment was therefore cancelled.

(5) The sale to the interveners was ordered by the court to be terminated and the property to be resold. The deposit was to be forfeited and paid to the plaintiffs in account of the defendant after defraying the expenses of the auction.

[Bahasa Malaysia summary

Plaintif adalah pemegang gadaian harta defendan ('harta itu'). Atas keingkaran defendan dalam membayar balik wang pinjaman, plaintif

telah memperolehi satu perintah mahkamah untuk penjualan harta itu melalui lelong awam. Pengisytiharan penjualan itu dengan khususnya mengatakan bahawa empat kaveat persendirian telah dicatatkan terhadap harta itu dan bahawa harta itu akan dijual tertakluk kepada syarat yang disebutkan di dalamnya. Syarat penjualan menetapkan, antara lain, bahawa 10% harga pembelian dikehendaki dibayar sebagai wang cengkeram sebaik sahaja tukul pelelong dijatuhkan dengan bakinya dikehendaki dibayar dalam masa 90 hari daripada tarikh penjualan. Masa untuk membayar baki harga pembelian telah dijadikan asas kontrak itu dan sekiranya pembeli gagal membuat demikian, wang cengkeram tersebut akan dilucuthak.

Pembeli harta itu ('pencelah') tidak dapat membayar baki harga pembelian dalam masa yang dinyatakan dan mereka memohon kepada penolong kanan pendaftar untuk perlanjutan masa. Berikutnya, penolong kanan pendaftar memberikan dua lagi perlanjutan masa yang tidak dibantah oleh plaintif. Walaupun demikian, pencelah masih gagal untuk membayar dalam masa lanjutan itu. Plaintif dan defendan telah membantah terhadap perlanjutan masa selanjutnya dan telah menulis kepada penolong kanan pendaftar untuk melucuthak wang cengkeram itu. Penolong kanan pendaftar, akan tetapi, telah menulis sepucuk surat kepada pencelah pertama mendesaknya untuk membayar baki harga pembelian dalam masa dua minggu daripada tarikh surat tersebut. Pencelah telah membayar baki harga pembelian kepada penolong kanan pendaftar dengan syarat wang itu tidak harus diserahkan kepada plaintif sehingga kaveat persendirian tersebut telah dihapuskan dan harta itu boleh dipindahmilik kepada pencelah. Defendan telah memohon kepada Mahkamah Tinggi, antara lain, untuk perintah membatalkan surat penolong kanan pendaftar itu dan untuk melucuthak wang cengkeram tersebut. Pencelah telah memohon untuk menentang permohonan defendan. Pencelah pada pertamanya berhujah bahawa defendan tidak ada locus standi untuk membuat permohonan itu. Kemudian dihujahkan pula bahawa walaupun masa pada asalnya adalah asas kontrak itu, plaintif dengan membenarkan masa yang telah ditetapkan untuk pembayaran itu berlalu, telah menyebabkan masa tidak lagi menjadi asas kontrak itu. Pencelah akhirnya berhujah bahawa mereka tidak terikat membayar baki harga pembelian sehingga kaveat persendirian telah dihapuskan. Isu juga timbul berkenaan sama ada penolong kanan pendaftar mempunyai bidang kuasa untuk membenarkan masa untuk pembayaran dilanjutkan selama dua minggu lagi.

Diputuskan, membenarkan permohonan defendan itu:

(1) Dalam penjualan paksa di bawah s 256 Kanun Tanah Negara 1965, pemegang gadaian adalah penjual kerana penggadai melepaskan haknya sebagai tuan punya berdaftar harta itu untuk faedah pemegang gadaian. Walau bagaimanapun, penggadai boleh mencelah untuk mengetepikan penjualan itu jika penjualan itu telah dijalankan dengan tidak jujur, bermuafakat untuk menipu,

atau dengan tidak wajar dan memudaratkan penggadai. Akibat pengetepian penjualan itu adalah untuk memulihkan hak penggadai untuk melepaskan gadaian itu. Oleh kerana itu defendan mempunyai locus standi untuk membuat permohonan ini.

(2) Plaintif hanya telah bersetuju untuk melanjutkan masa bagi pembayaran baki harga pembelian kepada tarikh tetap yang baru. Tiada keterangan yang menunjukkan bahawa plaintif bersedia untuk melepaskan syarat yang masa adalah asas kontrak itu. Memandangkan bahawa pencelah telah gagal membayar sebelum tarikh yang ditetapkan untuk pembayaran, plaintif berhak meminta penolong kanan pendaftar untuk melucuthak wang cengkeram itu.

(3) Syarat penjualan tersebut tidak menjadikan pembayaran baki harga pembelian itu tertakluk kepada penghapusan kaveat persendirian. Pencelah mengetahui akan kaveat itu sebelum tawar-menawar berlaku dan mereka mengambil risiko membeli harta itu.

(4) Penjualan paksa tertakluk kepada gadaian di bawah s 256 Kanun Tanah Negara 1965 dijalankan oleh pendaftar atau pelelong berlesen sebagai ejen pemegang gadaian yang merupakan penjual yang sebenar. Pendaftar dan pelelong tidak mempunyai sebarang kepentingan dalam penjualan itu. Penolong kanan pendaftar tidak mempunyai hak untuk membenarkan perlanjutan masa untuk pembayaran tanpa persetujuan plaintif. Dalam kes ini, perlanjutan masa untuk pembayaran telah dibuat oleh penolong kanan pendaftar lama sesudah tarikh tetap terakhir untuk pembayaran berlalu dan selepas plaintif telah meminta supaya wang cengkeram itu dilucuthak. Surat penolong kanan pendaftar melanjutkan masa untuk pembayaran oleh kerana itu dibatalkan.

(5) Penjualan kepada pencelah telah diperintahkan oleh mahkamah supaya ditamatkan dan harta itu dijual semula. Wang cengkeram tersebut dilucuthak dan dibayar kepada plaintif untuk faedah defendan selepas menanggung perbelanjaan lelong itu.]

Notes

For cases on time in relation to contracts, see 3 Mallal's Digest (4th Ed) paras 1588–1602)

Cases referred to

1 *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 (folld)
2 *Forsyth & Anor v Blundell & Anor* (1972–73) 129 CLR 477 (folld)
3 *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] 2 All ER 633 (refd)
4 *Tse Kwong Lam v Wong Chit Sen & Ors* [1983] 3 All ER 54 (refd)
5 *Siland Sdn Bhd v M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502 (folld)
6 *Barclay v Messenger* (1874) 30 LJ 351 (folld)
7 *Luck v White* (1973) 26 P & Cr 89 (folld)

8 *Buckland & Ors v Farmer & Moody (a firm)* [1978] 3 All ER 929 (folld)
9 *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190 (folld)
10 *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 (distd)

Legislation referred to
National Land Code 1965 ss 256, 259(3), 269, 326

V Punita (*Liew & Co*) for the plaintiffs.
A Rengganathan (*A Rengganathan & Co*) for the defendant.
Caroline Chin (*Andrew TS Goh & Co*) for the interveners.

Cur Adv Vult

Lim Beng Choon J: The defendant in this action applied by way of summons-in-chambers on 4 December 1989 (encl 13) for, inter alia, the following orders:

(1) That the letter dated 18 October 1989 issued by the senior assistant registrar to Ting Sik Eng whereby the said Ting Sik Eng was granted two weeks from 18 October 1989 to pay the balance of the purchase price may be cancelled.
(2) That the contract entered into by Ting Sik Eng and Yeo Poh Tee @ Yeo Tze Poh as the successful bidders at the auction sale on 21 January 1989 of that property described in the schedule thereof may be terminated.
(3) That the deposit sum of $800 paid by the said bidders may be forfeited and after defraying the expenses of the auction sale may be paid to the plaintiffs in account of the defendant.
(4) That any document signed by any officer of the court to purport to effect a transfer of the property described in the schedule hereto to the aforesaid bidders be deemed void.

On 8 January 1990, Ting Sik Eng and Yeo Poh Tee @ Yeo Tze Poh, the successful bidders of the property at the public auction, applied by way of summons-in-chambers to intervene, supported by a joint affidavit made by the two applicants and their application was allowed by me.

Before I proceed to deal with the defendant's application, it is useful to state briefly the following facts that can be culled from the respective affidavits of all the parties filed in this action.

The plaintiffs were the chargees of all that piece of land marked as Holding No 113, Town Area XXVII held under Advance Certificate of Title, district of central Malacca, state of Malacca together with a double storey shophouse erected thereon and numbered 44, Jalan Bandar Hilir 75000 Melaka (hereinafter referred to as 'the property') as security for a loan granted to the defendant. The defendant defaulted in repayment of the loan and the plaintiffs obtained an order of court to sell the property by public auction. Pursuant to another order of court dated 15 October 1985, the appointed auctioneer issued a printed proclamation of sale to sell the property by public auction on 21 January 1989 at a reserved price of

A $72,000. It was specifically stated in the said proclamation that there were four caveats entered against the property by four different caveators. It was also specifically stated that the property would be sold subject to the conditions of sale as appearing in the printed proclamation of sale. The conditions of sale relevant to this action are as follows:

B Condition 5 which reads:

> Immediately after the fall of the hammer the purchaser shall pay to the senior assistant registrar, High Court, Kuala Lumpur a deposit of 10% of the amount of the purchase price in cash and to part payment thereof and shall sign the memorandum at the foot of these conditions. In default of such deposit the
> C property shall forthwith be again put up for sale the deficiency in price (if any) which may result on a resale or the purchase money if there is no resale as the case may be, shall be recoverable from the defaulting purchaser as the case may be.

Condition 6 which reads:

D > The balance of the purchase price shall be paid in by the purchaser within ninety (90) days from the date of the sale to the senior assistant registrar High Court, Kuala Lumpur.

Condition 7 which reads:

> In default of such payment of the balance purchase price money within the
> E period allowed the property shall be again put up for sale. The deposit after defraying the expenses of the sales, shall be forfeited to the said plaintiffs and the deficiency in price (if any) which may result on a resale or the balance of the purchase money if there is no resale shall be recoverable from the defaulting purchaser as the case may be.

F Condition 12 which reads:

> For the purpose of these conditions the time allowed by the conditions for payments of the balance of the purchase money (namely 90 days) shall be deemed to be the essence of the contract.

The public auction was duly carried out on 21 January 1989 and Ting Sik
G Eng and Yeo Poh Tee @ Yeo Tze Poh were the highest bidders for and declared the purchasers of the property (hereinafter referred to as 'the purchasers' unless otherwise specified) for the sum of $73,000. They duly paid a deposit of $8,000 leaving a balance of $65,000 to be paid within 90 days as stipulated, namely, on or before 21 April 1989. The purchasers duly signed the memorandum at the foot of the printed proclamation of sale.

H Pausing here to mention an allegation made in the affidavit of Ting Sik Eng (the 'first intervener') affirmed on 4 January 1990 (encl 17) where she alleged that although the purchasers were aware of the existence of the four caveats on the property before bidding at the auction sale, nevertheless, she asserted that her husband (the 'second intervener') only agreed to bid at the
I sale on the assurance of the manager of the plaintiffs that the plaintiffs' solicitors would be responsible for removing the caveats on the property. She reiterated this allegation in her affidavit in reply affirmed on 20 August 1990 (encl 27) and stated that without this assurance she and her husband

would not have bid at the said auction and purchased the property as the property would not otherwise be transferred in their favour. This allegation was categorically denied by the manager of the plaintiffs who in his affidavit, affirmed on 19 September (encl 25), said that the plaintiffs had never at any time whatsoever assured the interveners that in return for their bidding at the auction the plaintiffs in return would remove the four caveats. The plaintiffs merely offered their services in assisting and helping the interveners in removing the caveats and accordingly instructed their solicitors, M/s Liew & Co, to do so on 16 February 1989. On this point I am more inclined to hold (and I do so hold) that the allegation of the first intervener is not true. As manager of the plaintiffs, a financial institution whose business is to grant loans and to accept charges of land as securities, the said manager would not be so foolish as to give such an assurance since he would know that to apply for a removal of caveat would take time and might be difficult. To give such an assurance would defeat the time limit condition stipulated in the proclamation of sale within which the purchasers must pay the balance of the purchase price. Furthermore, condition (10) of the proclamation of sale provided that the

> property is believed and shall be taken to be correctly described and is sold subject to all easements, liabilities and rights (if any) subsisting thereon or thereover without any objection arising to define the same respectively and no error, misstatement or misdescription shall annul the sale nor shall any compensation be allowed in respect thereof.

In the circumstances, it is certainly quite probable that the plaintiffs merely informed the purchasers that they would assist them in applying to remove the four caveats. The plaintiffs had kept their promise when on 16 February 1989, they wrote to their solicitors to proceed with the application for the withdrawal of the said caveats. In any event, in all their correspondence with the plaintiffs the purchasers never mentioned about the purported representation made by the plaintiffs' manager about the plaintiffs having accepted the responsibility to remove the caveats.

Reverting to the facts, it is to be noted that apparently, the purchasers sought the assistance of the plaintiffs to obtain an extension of time of one month from 21 April 1989 to pay the balance of the purchase price to which the plaintiffs consented and thereupon they wrote to the senior assistant registrar of the High Court, Kuala Lumpur ('the SAR') on 17 April 1989 (see exh YPK3 to the affidavit of the defendant affirmed on 30 November 1989 hereinafter referred to as 'encl 14') stating that the plaintiffs had no objection to the application of the purchasers made to them to extend time for payment by one month, that is until 21 May 1989. Another application was made by the purchasers to the plaintiffs to extend the time for payment by a further month from 21 May 1989. The application of the purchasers was again conveyed to the SAR by the plaintiffs who agreed to the extension until 21 June 1989 (see exh YPK4 annexed to encl 14). The purchasers were still unable to make payment and once again they applied to the plaintiffs to allow them a further extension of one month, that is up to 21 July 1989 to make the payment. Accordingly the plaintiffs referred their application to the SAR as the plaintiffs had no objection. Thereafter, the

purchasers themselves without the consent of the plaintiffs wrote direct to the SAR on 21 June 1989 (see exh YPK7 annexed to encl 14) to request for a two-month extension with effect from the date of the letter (that is up to 21 August 1989) to pay the balance of the purchase price on the grounds that the plaintiffs were in the process of applying to remove the four caveats, and that they had obtained a loan of $50,000 from a bank and they themselves had deposited a sum of $15,000 being the difference of the loan amount and the purchase price with their solicitors. By then the defendant became aware that the balance purchase price had not been paid and she therefore wrote a letter dated 5 July 1989 to the SAR suggesting, inter alia, that the SAR should not allow any extension of time and that the sale of the property to the purchasers be revoked and the deposit of $8,000 be forfeited (see exh YPK9 annexed to encl 14).

On 19 June 1989, the solicitors acting for OCBC wrote a letter (see exh T11 annexed to encl 27) to the solicitors for the plaintiffs confirming that they were willing to advise their client, OCBC, to release the loan amount of $50,000 towards payment of the purchase price subject to the following conditions being fulfilled:

(1) The purchasers have executed the charge documents in our client's favour to secure the loan granted to Lucky Music Centre.
(2) The difference between the purchase price and the loan amount has been paid.
(3) Our client has lodged a private caveat against the said property.
(4) There shall be no incumbrance against the said property except our client's private caveat.
(5) You undertake to send to us Borang 16F in favour of the purchasers upon receipt of the loan amount.
(6) The borrower has authorized us to pay the loan for the account of the purchasers.

In response, the solicitors for the plaintiffs wrote a letter dated 30 June 1989 (see exh T12 annexed to encl 27) informing the OCBC's solicitors that the application for withdrawal of the private caveats under s 326 of the National Land Code 1965 had been sent to the Pengarah Galian dan Tanah, Pejabat Pendaftar Hakmilik Tanah, Melaka on 23 June 1989 which said application had been duly acknowledged on 27 June 1989. They also undertook to send Form 16P in favour of the purchasers duly signed by the registrar of the High Court with the document of title and duplicate charge, *subject* to OCBC paying to them the balance of the auction price amounting to $65,000 by way of a banker's draft made in favour of the senior assistant registrar. It is to be noted that M/s Andrew TS Goh & Co were the common solicitors acting for both OCBC and the purchasers. No response was made to the letter of the plaintiffs' solicitors dated 30 June 1989 and no payment was made towards the balance of the purchase price. Instead, after a lapse of over 2½ months, M/s Andrew TS Goh wrote to the solicitors for the plaintiffs on 16 September 1989 informing them that the purchasers would like to request for extension of three months to settle the balance of the purchase price and asked the plaintiffs to write to the court in Kuala Lumpur for the extension (see exh T4 annexed to encl 27). The plaintiffs

did not respond to that letter and instead, the plaintiffs through their solicitors wrote a letter dated 2 October 1989 (see exh YPK10 annexed to encl 14) to the SAR the relevant part of which reads:

> Kami telah diberitahu oleh pelanggan kami bahawa pembeli telah gagal mematuhi fasal 6 dan 12 (conditions of sale) maka kami telah diarahkan oleh pelanggan kami untuk denda (forfeit) wang cagaran sebanyak $8,000 berkenaan fasal 7 (condition of sale).
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> Diharap pihak tuan dapat mengeluarkan surat pengesahan dan juga menetapkan tarikh lelong yang baru.

Thereafter the plaintiffs through their solicitors wrote the following letter dated 11 October 1989 to M/s Andrew TS Goh & Co:

> We refer to your letters dated 16 September 1989 and 5 October 1989.
>
> We have our clients' instructions to forfeit the 10% deposit as the purchasers have breached cll 6 and 12 of the conditions of sale.
>
> Our clients are exercising cl 7 of the conditions of sale.
>
> Kindly be informed.

Notwithstanding the aforesaid letter of 11 October 1989 of the plaintiffs' solicitors, M/s Andrew TS Goh & Co, still wrote the following letter dated 16 October 1989 to the SAR (see exh T6 annexed to encl 27) without the consent of the plaintiffs:

> Merujuk perkara diatas, disini kami ingin memberitahu tuan bahawa pembeli harta tersebut telah mengarah kami supaya memohon kepada tuan untuk memberikan masa tambahan kepada mereka untuk menyelesaikan baki wang jualan harta tersebut.
>
> Pembeli-pembeli harta tersebut akan menyelesaikan baki wang belian apabila kaveat yang telah dimasukkan atas harta tersebut ditarik balik atau pun dibatalkan.

I should also mention that on 29 August 1989, the Pendaftar Hakmilik Tanah Melaka wrote the following letter to the plaintiffs' solicitors (see exh T8 annexed to encl 27):

> Dirujuk kepada surat tuan bertarikh 14 Ogos 1989 mengenai perkara diatas. Adalah dimaklumkan bahawa pentadbiran ini telah mengeluarkan notis Borang 19C kepada pemasuk kaveat pada 29 Julai 1989. Dukacita dimaklumkan bahawa notis tersebut telah tidak dapat disampaikan oleh kerana kedua-dua pemasuk kaveat telah berpindah. Justeru itu pentadbiran ini mengambil tindakan berikutnya mengikut s 432 Kanun Tanah Negara.

It is important to note that while the aforesaid events were taking place and despite the several letters to the SAR sent by the parties and/or their respective solicitors, the SAR took no action; neither did he send any replies to all the letters sent to him. Suddenly on 18 October 1989 the SAR wrote the following letter to Ting Sik Eng (the first intervener):

> Adalah saya diarah merujuk kepada perkara diatas. Sila tuan jelaskan baki harga hartanah yang dibeli pada 21 Januari 1989, sebanyak $65,000 lagi dalam masa dua minggu daripada tarikh surat ini. Kegagalan tuan menjelaskan wang tersebut menyebabkan wang deposit sebanyak 10% daripada harga jualan akan dirampas.

As a result of the SAR's letter, the purchasers through their solicitors M/s Andrew TS Goh & Co wrote a letter to the SAR on 27 October 1989

enclosing a bank draft of $65,000 to settle the balance of the purchase price but with a condition that the SAR should not release the money to the plaintiffs until the four caveats had been cancelled and the property could be transferred to the purchasers (see exh YPK13 annexed to encl 14).

The first question raised by the interveners is the question of the standing of the defendant to apply for the reliefs sought in his application. In short, does he have the locus standi to apply for the reliefs bearing in mind that in a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is affected is to be regarded as the vendor. The defaulting chargor abdicates his right as registered owner of the land, vis-a-vis selling it, in favour of the chargee (see *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan*[1]). But this general proposition does not mean that if an auction sale has been conducted fraudulently, collusively or otherwise improperly to the prejudice of the chargor, he cannot intervene to set aside the sale whether or not the purchaser is privy to it. The effect of setting aside the sale is to restore the chargor's right of discharge of charge or under English common law mortgage, the equity of redemption. It is to be noted that the sale of a charged land may be set aside by the chargor not only in cases involving corrupting collusion or fraud, but also when the sale is tainted with impropriety. In *Forsyth & Anor v Blundell & Anor*,[2] Walsh J of the Australian High Court (at p 496) said of impropriety as:

> There may be impropriety of various kinds. What has sometimes been described as a fraud on the power and sometimes as a wilful or reckless disregard of the interests of the mortgagor and sometimes as a sacrificing of the interests of the mortgagor does not necessarily involve, in my opinion, the commission of actual fraud. It has been said that the word 'recklessly' as used by Lord Herschell in *Kennedy v de Trafford* and in other judgments, was used in a sense analogous to that in which it was used in *Derry v Peek*, see *Pendlebury v Colonial Mutual Life Assurance Society Ltd.* Whether or not that view is accepted, I think it is in accordance with authority and that it should be affirmed that there may be conduct which amounts to a reckless sacrificing of the interests of a mortgagor, although it is not shown that there is an actual intention to defraud him or that there is corruption or collusion with the purchaser. It is concerning conduct of that kind that inquiry must be made in this case whether or not it warranted the granting of an injunction.

It was held in the more recent and often quoted English case of *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd*[3] that the mortgagee when exercising his power of sale, owed the mortgagor a duty to take reasonable care to obtain a proper price. The Privy Council approved the *Cuckmere* decision[3] in *Tse Kwong Lam v Wong Chit Sen & Ors.*[4] In the *Tse Kwong Lam* case[4] the Privy Council ordered damages to be assessed by the Hong Kong High Court to be paid to the mortgagor. Should there be any impropriety of the sale or otherwise conducting the sale improperly whether on the part of the court registrar, or the chargee or the purchasers to the prejudice of the chargor, it may result in the sale being set aside on the application of the chargor. The sale is conducted at the instance of the chargee and neither he nor the purchaser should benefit from any impropriety or irregularity to the prejudice or at the expense of the chargor. In the local case of *Siland Sdn*

Bhd v M & J Frozen Food Sdn Bhd & Anor,[5] Richard Talalla JC (as he then was) held that the SAR had no right to extend time for payment of the balance of the purchase price of the sale of the land by auction as stipulated under the conditions of the sale upon the application of the purchaser to extend the time. The learned judicial commissioner therefore allowed the application made by the chargor to set aside the sale and forfeit the deposit paid by the purchaser. With respect I agree with the decision of the learned judicial commissioner and I therefore hold that in the present case the defendant has the locus standi to apply for the reliefs as set out in his application.

The second question is whether the plaintiffs were entitled to request the SAR to cancel the sale and forfeit the deposit after having earlier consented to three applications made by the interveners to him for an extension of time to pay the balance purchase price. It is true that the general principle is that when time is of the essence of the contract and when the plaintiff allows the time fixed for completion to pass and the parties go on negotiating, then time is no longer to be regarded as of the essence of the contract. But this general rule would not apply to a case where the circumstances show that an extension of time does not waive the new time as being of the essence. Thus in *Barclay v Messenger*,[6] Sir George Jessel MR said (at p 354):

> It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

Again in *Luck v White*,[7] Goulding J said (at p 95) that a mere extension of the period to a *new fixed date* would on the authorities have preserved the position that time was of the essence without fresh stipulation to that effect. Likewise in *Buckland v Farmer & Moody*,[8] the English Court of Appeal held, inter alia, that the extensions of time given were to fixed dates and had not counteracted the effect of the completion notice in making time of the essence of the contract. Buckley LJ said in that case at p 937:

> It is common ground between the parties that if a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date the time remains essential.

In the case of *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd*,[9] Abdoolcader J (as he then was), relying on a number of English authorities including the three authorities I have cited above, stated at p 201:

> The one and only extension of time for completion granted by the defendants in this case was to a fixed date, 30 September 1967. On the evidence, the defendants were at all times ready, willing and able to perform their part of the agreement but not so the plaintiffs as the evidence discloses they could only do so if at all at a reduced price and that too at a further extended time of at least seven months according to their last and final offer contained in their solicitors' letter of 28 September 1967. I find that by the extension of the completion date by a period of one month from 30 August to 30 September 1967, time was not waived and did not become at large but remained at all times still of the essence and that there was therefore no question that the plaintiffs were entitled, as they claim, to be given reasonable time to complete the purchase of the estate.

Applying the principles laid down in the aforesaid authorities to the present case, the plaintiffs/chargees had merely agreed to extend time for the payment of the balance of the purchase price to *new fixed dates*. There had been no negotiation as regards to the remaining conditions set out in the proclamation of sale. It is true that there had been three extensions of time but the final extension consented to by the plaintiffs was up to a fixed date of 21 July 1989 (see exh YPK5 to encl 14) by which time the interveners/purchasers had to pay the full purchase price. There is not an iota of evidence to show that the plaintiffs were prepared to waive the condition that time was to be of the essence of the vendor's contract of sale. Counsel for the interveners cited the case of *Wong Kup Sing v Jeram Rubber Estates Ltd,*[10] to support his contention that once the time for completion was allowed to pass, then time was no longer the essence of the contract and the plaintiffs must give reasonable notice of their intention to require the interveners to pay the balance of the purchase price. But that case is clearly distinguishable on the ground that there was not merely extension of time but something more, and that something can be seen from the judgment of Raja Azlan Shah J (as he then was) where it was said (at p 247):

> In our case it was an extension of time and something more, that is the forfeitable deposit made from time to time was increased to the extent of $300,000 as compared with $95,000 as stipulated in the original agreement. It is also of significance to note that in all the six extensions negotiations were continued after the extended dates fixed for completion and this conduct on the part of the defendants justified the plaintiff in assuming that he would have some indulgence in making his payments: (*Kilmer v British Columbia Orchard Lands Ltd*). Now two days prior to 15 November 1967 the plaintiff put in new proposals to extend the date to 31 December 1967. That was not acceptable to the defendants who on 15 November 1967 made their final stand and abandoned the contract when the plaintiff failed to pay the balance of the purchase money. There was no doubt further negotiations after 15 November 1967 but they were entered into without prejudice to the defendants' rights under the original agreement.
>
> Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid.

In the present case, there had never been anything more than mere extensions of time to new fixed dates for the payment and the final date was fixed for payment on 21 July 1989. What was worse was that not only did the interveners fail to pay by that date, they also allowed time to pass by without taking any step immediately prior to or on 21 July 1989 to preserve the advantage of the extensions of time given to them earlier. It was only on 16 September 1989 that their solicitors wrote to the plaintiffs' solicitors to ask for approval of a further extension of three months. By then, the fixed date of payment of 21 July 1989 had lapsed. The plaintiffs have the right either to approve or reject the request for extension and if they rejected it they were entitled to rely on the conditions of the proclamation of sale to forfeit the deposit of $8,000 paid by the interveners and to revoke the sale of the property. It may be recalled that the interveners insisted that they were not

bound to pay the balance of the purchase price until the four caveats had been revoked. But under the conditions of the proclamation of sale there was nothing to suggest that the payment of the balance of the purchase price was subject to the removal of the said caveats. The only relevant conditions were that the purchasers had to pay a 10% deposit of the purchase price upon the fall of the hammer and the balance of the purchase price within 90 days regardless of the presence of the four caveats. In any event, the plaintiffs had gone out of the way to assist them although they were not contractually bound to assist them to have the caveats removed, and the fact that removal of the said caveats was not successful is through no fault of the plaintiffs. On the other hand, the interveners knew about the said caveats before bidding and they took the risk of purchasing the property in spite of the presence of the said caveats. Furthermore, there is nothing in the National Land Code 1965 which allows a purchaser in an auctioned sale of charged land to postpone the payment of the full purchase price. On the contrary, s 259(3) of the said Code provides:

> The purchaser *at the sale* shall, upon payment to the said officer of the full amount of the purchase price, be entitled to receive from him —
> (a) a certificate in Form 16P that the land or lease in question has been sold to him under the authority of this Act (which certificate shall, as provided by section 267, be registrable by the purchaser as if it were an instrument of dealing). (Emphasis added.)

The SAR in supervising the auction sale could have made it a condition of the proclamation of sale that the full purchase price should be paid by a successful bidder immediately after the fall of the hammer. The only protection the successful bidder has is provided under s 269 of the said Code which does not include a right for him to postpone payment of the full purchase price. From the above discussion, I am satisfied that the plaintiffs had the right to ignore the request of the interveners for further extension of time beyond the fixed date of 21 July 1989 for payment of the balance of the purchase price and to request the SAR to forfeit the deposit of the $8,000 and to revoke the sale.

The final question is whether the SAR has jurisdiction to allow the time for payment to be extended for a further two weeks with effect from the date of his letter of 18 October 1989 (see exh YPK2 annexed to encl 14). Under a forced sale of land subject to a charge pursuant to s 256 of the National Land Code 1965, the fact that the sale is conducted by the court or its registrar does not mean that the court or its registrar has an interest in the sale or any dispute arising therefrom. The registrar/licensed auctioneer sells the property as agent of the chargee who is the real vendor. Thus in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan,*[1] VC George J said (at p 319):

> In a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is effected is to be regarded as the vendor. Section 253(1), in stating 'that the provisions of this chapter in the National Land Code (dealing with "Remedies of Charges — Sale") shall have effect for the purpose of enabling *any chargee to obtain the sale of the land* ... to which his charge relates ...' and in particular the words therein that I have emphasized I think makes that clear.

Further down the same page of the reported case his Lordship went on to say:

> The sale takes place in terms of the order for sale made and the conditions of sale imposed 'in accordance with the order and any determination thereunder by the registrar of the court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement. In my judgment, no variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties. However, where either the order or the conditions of sale or the National Land Code 1965 specifically reserves any right to vary, then and only then may such a right be exercised. It seems to me that the only such reservations available in the instant case are that provided by s 259(2)(e) which allows the registrar in the event of the sale being aborted to fix a subsequent date for the sale either at the same or at a reduced reserve price and that provided by condition 20 of the conditions of sale which is to the effect that the decision of the senior assistant registrar shall be final *in all matters not provided for* under those conditions (emphasis provided) and condition 4 which provides for the senior assistant registrar the right to refuse any bid.

With due respect, I totally agree with what my brethren judge has said in the *Liew Yet Lian* case.[1] The SAR had no right whatsoever to grant the extension of two weeks vide his letter of 18 October 1989 (see exh YPK12 annexed to encl 14) for the payment of the balance of the purchase price without the consent of the plaintiffs. What makes the matter worse is that the extension was granted long after the fixed date (namely, 27 July 1989) of the payment of the balance of the purchase price had expired and the sale should be revoked and the deposit is forfeited. Indeed the plaintiffs through their solicitors had notified the SAR by letter of 2 October 1989 to forfeit the said deposit pursuant to condition 7 of the proclamation of sale, and to fix a date for a resale of the property by carrying out another auction, not that the plaintiffs needed to notify the SAR for the latter should have forfeited the deposit and revoked the sale upon the expiry of the fixed date to pay, ie on or after 28 July 1989. Thus in the *Liew Yet Lian* case,[1] VC George J said at p 320:

> In my judgment there is no need for any application or order to have the forfeiture effected. The dictionary meaning of 'forfeit' in the context is to lose the right to or to be deprived of. Particularly as time had expressly been made of the essence in respect of the condition to complete, as soon as the 30 days expired the money was forfeited — the purchaser lost the right to it or was deprived of it.

Again with respect I agree with the proposition of the learned judge.

Judgment must therefore be in favour of the defendant's application and the opposing application of the interveners is dismissed. I accordingly adjudge as follows:

(a) The letter dated 18 October 1989 issued by the senior assistant registrar to Ting Sik Eng whereby the said Ting Sik Eng was granted two weeks from 18 October 1989 to pay the balance of the purchase price is hereby cancelled.

(b) The contract entered into by Ting Sik Eng and Yeo Poh Tee @ Yeo Tze Poh, interveners, as the successful bidders at the auction sale on 21 January 1989 of the property described in the schedule thereof is hereby terminated and the property be resold. It must follow that any registration of the title to the property in the name of the interveners be revoked.

(c) The deposit sum of $8,000 paid by the said successful bidders is hereby forfeited and paid to the plaintiffs in the account of the defendant after defraying the expenses of the auction sale.

(d) Any document signed by any officer of the court purporting to effect a transfer of the property to the said interveners is hereby declared null and void. It must also follow that the issue document of title if in the possession of the interveners, be returned to the senior assistant registrar.

(e) There be liberty to apply.

(f) The interveners to pay the defendant's costs of action to be taxed.

Order accordingly.

Reported by Wong Kian Kheong